

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4804 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

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LAXMANSINGH

Versus

INDIAN PETROCHEMICALS CORPORATION LTD.

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Appearance:

MR KB PANDE for Petitioners

Mr.S.N.SHELAT for MR DS NANAVATI for Respondent No. 1

RULE SERVED BY DS for Respondent No. 2

MR GM JOSHI for Respondent No. 7, 8

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CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 17/09/1999

C.A.V. JUDGEMENT

1. The prayers of 31 petitioners in this petition are manifold. The first prayer is for holding that the petitioners are regular permanent employees of the respondents No.1 to 6 from the date of their entry in service with regular pay scales and other consequential benefits and are entitled for difference of salaries and other consequential benefits for the past years including difference of Bonus, etc. The second prayer is to hold that the practice of engaging the petitioners as Security Guards through contractor and refusing permanent status and regular pay scales and other consequential benefits to the petitioners by the respondents No.1 to 6 is arbitrary and violative of Articles 14, 16, 21 and 39(d)

of the Constitution of India, hence the petitioners are entitled to be regularised as regular permanent employees of respondents No.1 to 6 from the date of their entry in service with consequential benefits. The third prayer is to hold that continuing the petitioners as contract employee/appointment on contract years together, without regularising the petitioners tantamounts to exploitation of the petitioners which is illegal and violative of aforesaid Articles of the Constitution of India. The interim relief was also sought that the respondents be restrained from terminating the services of the petitioners or from changing their service conditions and that the respondents be further restrained from disturbing the possession of the quarters which are allotted to the petitioners, in any manner, whatsoever.

2. The 31 petitioners are employed as Security Guards. The case of the petitioners is that they are employees of Indian Petrochemical Corporation Ltd. The respondents No.1 to 6 are their officers. The respondents No.7 & 8, namely, Bombay Intelligence Security India Ltd. is a limited company which entered into contract with Indian Petrochemical Corporation Limited for providing services of security Guards to the Company. According to the petitioners the so called arrangement between respondents No.1 to 6 on the one hand and respondents No.7 & 8 on the other hand is merely sham and factitious arrangement and that the petitioners are direct employees of the Company right from their entry in service and so called contractor Bombay Intelligence Security India Ltd. is not their employer and the arrangement between the respondents No.1 to 6 and 7 & 8 is collusive, sham and bogus. The petitioners further alleged that they have been serving with respondents No.1 to 6 for the last eight years and have also served for 240 days in a year, but the respondents No.1 to 6 are neither regularising the services of the petitioners nor they are giving salary and other consequential benefits which are being paid to the other employees of the company. It is further pleaded that since the wages, etc. are being paid by the company the petitioners are direct employees of the company and the so called intermediary respondents No.7 & 8 are not their employers. Subsequently the writ petition was amended and another ground was taken that the notification dated 9.12.1976 u/s.10 of the Contract Labour Act, 1970 prohibiting the employment of contract labour for watching of building owned and occupied by establishments in respect of which the appropriate Government under the said Act is Central Government and in view of this notification since the petitioners are working in the

premises of respondents No.1 to 6 for watching building and offices, etc.owned and occupied by the respondents No.1 to 6 the said notification is applicable, hence the petitioners are entitled for regularisation from the date of their entry in service. With these allegations the aforesaid reliefs in the writ petition have been sought by the petitioners.

3. The respondents No.1 to 6 in their counter Affidavit have deposed that the petitioners are not the employees of the company rather they are employees of the contractor, respondents No. 7 & 8. A contract was given by the company to the respondents No.7 & 8 initially for a period of one year from 1.11.1990 to 31.10.1991 after inviting tenders through press advertisement in the year 1990. The petitioners were employed by the said respondents No.7 & 8 and were paid minimum wages, Bonus, provident fund, gratuity, leave salary, etc. by respondents No.7 & 8. The contract between the company and the contractor was extended on 6.5.1998. Accordingly the petitioners are regular employees of the seventh & eighth respondents contractor which was subsequently converted into a limited company. The said contract was to come to an end on 31.7.1998. It is further deposed that there is no permanent post of Security Guards in the company and that their services are taken according to the requirement at various times and quarters are made available on rent for residence/office purpose, but they are not the employees of the company rather they are the employees of the contractor, respondents No.7 & 8. It is also deposed that the question whether the contract between the company and the respondents No.7 & 8 is sham is a disputed question of fact which can be decided as industrial dispute by the Labour Court or the Industrial Tribunal and not by this Court. It is also stated that there was 2-P settlement between the workers and other contractors and based upon the said settlement the corporation is absorbing the employees gradually. However, there was no such settlement in respect of providing security Guards. The writ petition is said to be not maintainable.

4. The respondents No. 7 & 8 in their separate counter Affidavit have deposed that the contract between the company and the respondents No.7 & 8 is a genuine contract and not a bogus and sham contract. Initially they were doing the business in partnership but subsequently it was converted into a limited company under the provisions of the Company Act. Their business is to supply security personnel to various establishments. They have deposed that the petitioners

are their employees and are paid minimum wages as per the rates prescribed by the Government. It is also stated that simply because some persons are accommodated at one place it would not give them vested right to stick to a particular principal employer and ask for regularisation and other benefits. The respondents No.7 & 8 are said to be licence holders under the provisions of the Contract Labour (Regularisation and Abolition) Act. The copy of the licence has been filed as Annexure : R-1 to this counter Affidavit. The respondents No.7 & 8 are engaged by the respondent No.1 for the purpose of protecting the area of township, administrative complex and other non-plant areas which are not coming within the scope of industries. Thus, the respondents No.7 & 8 are not engaged for providing contract labour in any industry. These respondents have engaged more than 100 personnels and the number varies from time to time as per the requirements and exigencies of situation, but these numbers never diminish below 100 and out of 100 and odd persons, only 31 persons have filed this petition. It is also pleaded that the dispute of such nature is to be adjudicated on the basis of oral and documentary evidence by the Labour Court or the Industrial Tribunal and not by this Court. These respondents have assured in Para : 8 of their counter Affidavit that even if the contract with respondent No.1 is discontinued they will not terminate the services of the petitioners and other similarly situated workmen and they will continue to employ them at other places where their services are required to be engaged by other establishments through these respondents.

5. The Affidavit, Counter Affidavits, Rejoinder Affidavit and written submissions as well as detailed oral arguments of the learned Counsel for the parties were heard and considered.

6. In view of the undertaking given by the respondents No.7 & 8 in Para : 8 of their Counter Affidavit the interim relief cannot be granted because these respondents have secured the services of the petitioners. The respondent No.1 has admitted that the petitioners were given residential quarters in the premises on rental basis. In case it is found that they are not direct employee of the respondent No.1 the facility of residential quarters can be withdrawn by the respondent No.1. In this view of the matter relief (D) cannot be granted.

7. The main controversy is whether the petitioners are direct employees of the respondents No.1 to 6 and

especially the Indian Petrochemical Corporation Ltd. or they are employees of the respondents No.7 & 8. This controversy which has been raised in detail in this petition should have been raised before the Labour Court or before the Industrial Tribunal by raising industrial dispute. The petitiners should have raised industrial disputes that they are permanent employees of the company and that they are engaged on permanent post, still they are not given regular salary which is paid to other employees similarly situated and other consequential benefits. Admittedly no such dispute was referred to the industrial tribunal or the Labour Court. The question is whether such dispute can be raised for the first time in this petition. In my opinion unless these disputes were raised before the Labour Court or before the Industrial Tribunal and an award was given against the petitioners they cannot be permitted to take up these issues directly before this Court under Article 226 of the Constitution of India, nor such questions can be permitted to be raised under Article 227 of the constitution of India.

8. Likewise the dispute whether the Labour contract system and labour contract agreement between the Indian Petrochemical Corporation Ltd. and Bombay Intelligence Security India Limited is a genuine contract or sham transaction cannot be decided by this Court. Such question can be decided on evidence by the Labour Court or by the Industrial Tribunal. The Honourable Supreme Court in R.K.Panda v/s. Steel Authority of India, reported in 1994 (5) SCC 304 has held as follows :

"Whether the contract labourers have become the employees of the principal employer in course of time and whether the engagement and employment of labourers through a contractor is a mere camouflage and a smokescreen, as has been urged in this case, is a question of fact and has to be established by the contract labourer on the basis of the requisite material. It is not possible for the High Court or this Court while exercising writ jurisdiction or jurisdiction under Article 136 to decide such questions, only on the basis of affidavits. It need not be pointed out that in all such cases, the labourers are initially employed and engaged by the contractors. As such at what point of time a direct link is established between the contract labourers and the principal employer, eliminating the contractor from the scene, is a matter which has to be established on material produced before the Court. Normally, the Labour Court and the

Industrial Tribunal under the Industrial Disputes Act are the competent fora to adjudicate such disputes on the basis of the oral and documentary evidence produced before them.

9. In view of above observation of the Apex Court the question whether the Labour Contract system is a genuine agreement or a sham transaction is to be decided on the basis of evidence and not on the strength of Affidavit and counter affidavit. The competent fora for decision of such dispute, according to the Apex Court, is the Labour Court or the Industrial Tribunal. The dispute as to whether the Labourers were appointed directly or through a contractor is also a question of fact. Likewise it is also a question of fact that a direct link is established between the employer and the contract labourers. As such these questions cannot be decided on the strength of Affidavit, Counter Affidavit and Rejoinder Affidavit filed by the parties.

10. It may, however, be mentioned that even on persual of affidavit, counter affidavit, rejoinder affidavit and other documents these do not furnish prima facie evidence that the petitioners are direct employees of the company. There is nothing on record to show that they were appointed by the company. On the other hand there was a contract between the company and the respondents No.7 & 8 to provide services of Security Guards to the company. In pursuance of that contract the petitioners were employed by the respondents No.7 & 8 and their services were made available to the company. It is clear from the Affidavit of the respondents No. 7 & 8 that the petitioners are their employees and that they are paying wages and other monetary benefits to them. It is also clear that they had posted the petitioners and other 100 and odd personnel as security Guards in the company. There is thus no direct control over the appointment, payment of salary, etc. over the petitioners in the hands of the company. Simply because the company is paying money to the contractor for payment to the labourer it will not create direct relationship of employer and employee between the petitioners and the respondent No. 1 company.

11. The stand of the company is also to the effect that the petitioners are not their employees. There does not seem to be any reason to disbelieve this stand because the respondent no.1 is a large establishment and industry and it could not have discriminated the petitioners from other regular employees. If the company can afford to pay Rs.7000/- per month as salary to other

employees there was no reason why the company could not pay Rs.60/- per day to the workers. The mode of payment to dailywagers also indicates that they were never regular employees of the company. The benefit of Provident Fund, etc. was given to the petitioners by the respondents No.7 & 8 and not by the respondents No.1 to 6. It is also the stand of the company that there is no permanent post of security guards and that services of the security guards are obtained according to the necessity and exigency and since there is no vacant or permanent post of security guards they could not be so employed by the company. It is also the stand of the company that the contractor is paying minimum wages to the petitioners according to the provisions of the Minimum Wages Act and also the respondents No. 7 & 8 are paying the Bonus, leave salary and other benefits to them.

12. Further the respondents No.7 & 8 have undertaken not to terminate the services of the petitioners inspite of the fact that the contract between the respondent No.1 and the respondents No.7 & 8 is terminated. They have undertaken in Para : 8 of their counter Affidavit that they will absorb the petitioners and other similarly situated persons at other places where their services are needed by the other establishment. In view of these materials there is no prima facie evidence that the petitioners are direct employees of the company.

13. The question of existence of 2-P settlement between the workers and other contractors raised by the learned Additional Advocate General does not seem to be very material. He contended that in view of 2-P settlement, which is binding upon the petitioners also, they cannot be given any benefit. Shri K.B.Pande on the other hand pointed out in his written submission that there is contradiction about existence of 2-P settlement between the company and the petitioners. Reference is made to Para : 11 of the Counter Affidavit of Respondents No.1 to 6. The last sentence in this para makes it clear that there is no 2-P settlement in respect of providing security guards. Consequently if there is no 2-P settlement regarding providing Security Guards the said agreement or settlement cannot be binding on Security Guards. The security guards were not parties to this settlement.

14. Shri K.B.Pande has argued that the alleged contract system is bogus transaction because no licence has been obtained by them. However, in Para : 3 of the Counter Affidavit of Respondents No.7 & 8 it is clearly

mentioned that these respondents are having licence and they are licence holders under the provisions of Contract Labour (Regulation and Abolition) Act, whose copy has been filed as Annexure R-1 to this Counter Affidavit. Consequently it cannot be said that the respondents No.7 & 8 are not licence holders and for this reason also the agreement between the contractor and the company cannot be said to be prima facie bogus or sham transaction.

15. Shri K.B.Pande, learned Counsel for the petitioner has referred to Annexure : E, Notification dated 9.12.1976 issued by the Government of India, Ministry of Labour prohibiting the employment of contract labour on and from 1.3.1977 for sweeping, cleaning dusting and watching of buildings owned or occupied by establishments in respect of which the appropriate Government under the said Act is the Central Government. According to Shri Pande this notification is applicable in this case, hence the petitioners are entitled for regularisation from the date of entry in service. He has referred to the case of Air India Statutory Corporation v/s. United Labour Union, reported in A.I.R. 1997 SC 645. In this case the Apex Court at Page : 680, Para : 58 inter-alia held that the contractor is an intermediary between the workmen and the principal employer. The moment the contract labour system stands prohibited u/s.10(1), the embargo to continue as a contract labour is put an end to and direct relationship has been provided between the workmen and the principal employer, thereby the principal employer directly becomes responsible for services of the workmen hitherto regulated through the contractor.

16. On the basis of this observation Shri Pande contended that after abolition of contract labour system the petitioners have become direct employees of the company. In reply to this Mr.Shelat, learned Addl. Advocate General pointed out the Apex Court's verdict in Bharat Petroleum Corporation Ltd. v/s. Mumbai Sharmik Sangha & ors. reported in A.I.R. 1998 SC 720 rendered by a Constitution Bench of the Apex Court. One of the questions referred in that case was whether the observations of the Constitution Bench in Gammon in so far as section 10 of the Act is concerned are correct and whether the Central Government u/s.10(1) and (2) of the Act can by notification prohibit contract Labour doing the work of cleaning, sweeping, etc. at the residential premises of the staff or sports complex owned by the Bharat Petroleum Corporation or whether the Central Government u/s.10 of the Act has no jurisdiction to abolish such contract labour. According to the learned



Additional Advocate General till that question is decided by the Apex Court the petitioners are not entitled to any relief.

17. In reply to this Shri Pande contended that the petitioners were not engaged for the work of sweeping, cleaning, etc. of the residential premises or the staff or a sport complex owned by the company, hence answer to the question by the Constitution Bench of the Apex Court will not affect the merits of this case.

18. This contention will also raise a disputed question of fact as to whether the petitioners were employees within the industrial area of the company or whether they were employees to keep watch merely over the residential premises and factory premises, etc. It appears from the stand of the respondent company that the security guards were not permitted to enter the portion where the material of the factory are kept and where the machinery of this factory is operating. Such disputed question of fact to my mind in view of the Apex Court decision in R.K.Panda v/s. Steel Authority of India reported in 1994 (5) SCC 304 (supra) can be decided by the Labour court or the Industrial Tribunal and not by this Court because this Court will not entertain and decide disputed questions of fact.

19. The Apex Court in Vegoils Pvt.Ltd. v/s. The Workmen, reported in A.I.R. 1972 SC 1942 observed that if the work for which the contract labour is employed is incidental to and closely connected with the main activity of the industry and is of a perennial and permanent nature, the abolition of contract labour would be justified. In view of this verdict of the Apex Court evidence is required to be adduced whether the work for which the petitioners were employed is incidental and closely connected with the main activity of the company and whether it is of a perennial and permanent nature. These questions of fact cannot be decided on Affidavits and Counter Affidavits.

20. In view of foregoing discussions it can be said that the petitioners should have first approached the Labour Court or the Industrial Tribunal raising industrial dispute and should have come to this Court after award was given against them. In such situation the writ petition is not maintainable. The question whether the labour contract system is a genuine transaction or fake and sham transaction on the facts and circumstances of the case cannot be decided by this court. For the reasons given in the foregoing portion of

this Judgment no prima facie material is found for inferring that the labour contract system is bogus simply with a view to deprive the petitioners of their salaries and other consequential benefits nor is there any clinching evidence to hold that the petitioners are employees of respondents No.1 to 6. As such other reliefs sought in the writ petition also cannot be granted.

21. In the result, I do not find any merit in this petition which is hereby dismissed. No order as to costs.

sd/-

Date : September 17, 1999 ( D. C. Srivastava, J. )

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